FILED
JUL 28 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-3

In The

Supreme Court of the United States

October Term, 1997

OLLIE MASTRONARDI,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI with Appendix

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STATEMENT OF THE CASE

Petitioner does not sufficiently set forth the detailed procedural history of this case. Respondent's accurate portrayal will establish that Petitioner has re-litigated the same issues before various tribunals. The Supreme Court of Ohio has denied jurisdiction at least twice.

On May 10, 1996, Petitioner was found guilty by a jury of vehicular homicide with a finding that Petitioner was under the influence of alcohol during the commission of the offense and guilty of involuntary manslaughter with five underlying misdemeanor offenses. On May 24, 1996, the trial court imposed a definite six-month sentence on the vehicular homicide offense and an indeterminate sentence of 5 to 10 years on the involuntary manslaughter offense, to be served concurrently. (Writ, App. C).

Petitioner appealed the case on the merits to the Sixth District Court of Appeals for Erie County, Ohio. On December 5, 1997, the appellate court affirmed the trial court's judgment with respect to thirteen of Petitioner's fourteen assignments of error but ruled that the trial court erred in sentencing Petitioner on both the vehicular homicide and involuntary manslaughter convictions because the court found the

offenses to be allied offenses of similar import. (Writ, App. B). Petitioner sought leave to appeal the appellate court's affirmance of the remaining thirteen assignments of error with the Supreme Court of Ohio. Leave to appeal was denied on April 1, 1998.

Upon remand for re-sentencing, the trial court merged the vehicular homicide and involuntary manslaughter convictions and re-sentenced Petitioner to 5 to 10 years of imprisonment. Petitioner is currently seeking review of this sentence in the Sixth District Court of Appeals for Erie County, Ohio.

During the pendency of Petitioner's appeal on the merits, Petitioner filed a petition for post-conviction relief. The petition raised the same issues that were raised in the appeal on the merits. The trial court granted Respondent's motion for summary judgment and dismissed the petition. Petitioner once again appealed. On April 1, 1998, the Sixth District Court of Appeals for Erie County, Ohio, affirmed the trial court's judgment dismissing the petition and ruled that all of Petitioner's assignments of error were barred by ***res judicata***. Specifically, the Sixth District Court of Appeals ruled that "all of [Petitioner]'s arguments were previously considered or could have been

considered by this court on direct appeal." Leave to appeal to the Supreme Court of Ohio was denied on July 15, 1998.

STATEMENT OF FACTS

Petitioner's characterization of the testimony at trial omits several pertinent facts and misstates others. The following statement of facts will demonstrate that Petitioner's fact bound assertions do not warrant review by this Court.

On June 24, 1995, the young victim, Scott Brabander (hereinafter "Scott"), his friend Roger, and Scott's parents were out on the Brabander's Wellcraft boat. While idling at the dock at the Casino Restaurant on Kelley's Island, Scott's father observed a power boat speeding directly toward them traveling at about 50 miles per hour. The Brabanders watched as the power boat, now visible as a Top Gun Cigarette boat, quickly approached the dock. As the Cigarette boat bore down upon them, Scott's father yelled for the Wellcraft occupants to jump. Scott's parents jumped into the water safely. Scott tried to assist Roger, who ultimately remained flat on the boat unharmed. The Cigarette boat collided with the Wellcraft boat, flew into the air and landed in the water on the other side of the dock. Scott,

in attempting to jump from the Wellcraft, was struck in mid-air by the Cigarette boat. Initially, Scott appeared to be okay and out of danger. However, Scott quickly became disabled and rescuers had to pull Scott from the water. Scott made one final gasp of breath and died.

Petitioner grossly understates the testimony at trial when he states, "Petitioner's boat...apparently hit the port side of the Brabander boat, flew over and landed on the other side." (Writ at p. 8). Petitioner's almost nonchalant characterization of the crash severely underscores the speed at which the Top Gun Cigarette boat was traveling, the force with which the Cigarette boat collided with the Wellcraft boat and the overwhelming trauma inflicted upon Scott's young body as a result of the blunt force.

The evidence at trial demonstrated that Petitioner was the operator of the Cigarette boat at the time of the collision, that Petitioner had been consuming alcohol and driving recklessly throughout the day prior to the collision, and that Petitioner had even collided with another boat earlier in the day. Several witnesses to the crash observed the Cigarette boaters to be laughing and pouring drinks over the side of their boat. None of the Cigarette boaters

attempted to assist the Brabanders.

According to officers of the United States Coast Guard and the Ohio Department of Natural Resources, Petitioner failed field sobriety tests and was impaired. Petitioner refused to take a breathalyser but blood was drawn approximately ten and one-half hours after the collision. As a result of the lapse of time, no alcohol or drugs were found in Petitioner's blood sample. Respondent's expert testified, however, that the alcohol could have completely metabolized over the ten and one-half hour period.

Witnesses to the collision further testified that Petitioner's boat was traveling at an excessive rate of speed. According to the watercraft Rules of the Road, Petitioner's Cigarette boat illegally crossed the Brabanders' Wellcraft boat, with Petitioner taking no action to avoid the collision. Moreover, Respondent presented evidence which proved that Petitioner operated his boat recklessly and that Scott was killed as a proximate result of Petitioner's actions.

ARGUMENT

Respondent shall separately address Petitioner's "Questions Presented For Review" and demonstrate that Petitioner's efforts to challenge well-settled law and sound policy do not merit review by this Court.

A. THE DISCLOSURE OF GRAND JURY TESTIMONY IS GOVERNED BY RULE 6(E) OF THE OHIO RULES OF CRIMINAL PROCEDURE AND THE RELEASE OF ANY SUCH TESTIMONY FOR USE PRIOR TO OR DURING TRIAL IS WITHIN THE DISCRETION OF THE TRIAL COURT.

In Ohio, the disclosure of grand jury transcripts is governed by Rule 6(E) of the Ohio Rules of Criminal Procedure (hereinafter "Crim.R."). [Writ, App. H]. While a defendant may inspect grand jury transcripts only upon the demonstration of a "particularized need," **State v. Greer**, 66 Ohio St.2d 139 (1981), paragraph one of the syllabus, there is no such requirement of particularized need on the part of the State. Consequently, the release of grand jury testimony under Crim. R. 6(E) for use prior to or during trial is within the discretion of the trial court. **Id**.

Upon appeal of Petitioner's case on the merits, the Sixth District Court of Appeals

correctly stated that Crim.R. 6(E) provides for the disclosure of grand jury testimony to the prosecuting attorney for use in the performance of his duties. The court additionally determined that the use of grand jury testimony in the instant case was not prejudicial to Petitioner.

In the case at bar, Respondent used the grand jury testimony of two of Petitioner's witnesses to impeach their testimony at trial when the witnesses made statements which were inconsistent with their prior sworn statements to the grand jury. Petitioner did not object to the use of the grand jury testimony, thereby waiving any error. Further, the record demonstrates that Petitioner was provided with a copy of the relevant portions of the grand jury proceedings that were used during the cross-examination of Petitioner's witnesses. Therefore, Petitioner has failed to demonstrate that the trial court's attitude was unreasonable, arbitrary or unconscionable in permitting Respondent to use the grand jury transcripts. The use of the grand jury transcripts was proper and within the scope of both the Rules of Evidence and the Ohio Rules of Criminal Procedure. **See also** **State v. Diehl**, 67 Ohio St.2d 389 (1981).

B. UNLESS A CRIMINAL DEFENDANT CAN SHOW BAD FAITH ON THE PART OF THE POLICE, FAILURE TO PRESERVE EVIDENCE DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

In the case at bar, the record is devoid of evidence which demonstrates that Respondent or any of its agents instructed the mechanic to alter, destroy or conceal evidence. Because the mechanic who examined Petitioner's boat did not alter, conceal, destroy or remove any record, document or thing, and certainly did not act with the requisite intent, the mechanic did not "tamper with evidence." Contrary to Petitioner's assertions, the mechanic made no changes to the boat and acted only with the intent of solving the mystery of whether the boat malfunctioned on the day Scott was killed. The record demonstrates that the mechanic left intact a loose cable connector so that the boat remained in the same condition in which it was found. Furthermore, there was no showing that the mechanic acted in bad faith and purposely

attempted to impair the value or availability of the evidence in question. Moreover, Petitioner was provided with a copy of the videotape of the mechanic's examination of Petitioner's boat. Thus, Petitioner was permitted at trial to attack the credibility of the mechanic's testimony. The issue of tampering with evidence was properly placed before the jury, the sole judge of the weight of the evidence and the credibility of the witnesses. **State v. DeHass**, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Therefore, the Sixth District Court of Appeals properly found that the mechanic did not tamper with the evidence.

C. OHIO'S AGGRAVATED VEHICULAR HOMICIDE STATUTE SPECIFICALLY AUTHORIZES THE FINDER OF FACT TO MAKE A DETERMINATION AS TO WHETHER THE OFFENDER WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF COMMISSION OF THE OFFENSE.

The trial court properly instructed the jury to consider whether Petitioner was under the influence of alcohol while in the commission of the offenses of aggravated vehicular homicide or vehicular homicide. A finding of alcohol consumption lies within the parameters of O.R.C. §2903.06 and may aid the jury in determining whether and to what

extent there was a lapse of care. **State v. Harder**, **unreported**, Case No. OT-95-031 (Sixth App. Dist., Ottawa Co., Mar. 29, 1996). "Once an individual has been found guilty of vehicular homicide, the statute provides for the additional step of determining whether a defendant committed the offense while under the influence of alcohol or drugs." **Id.** (Writ, App. F).

Since the statute specifically authorizes the finder of fact to make a determination as to whether a defendant committed the offense while under the influence of alcohol or drugs, Petitioner's allegation that the jury was presented with an unindicted additional finding is without merit. Petitioner was charged with the offense of operating a watercraft while under the influence of alcohol. Thus, Petitioner was on notice of exactly what was alleged. Moreover, Ohio Jury Instructions clearly provides that alcohol consumption with respect to vehicular homicide is an "additional finding" and not a specification. Consequently, there is no requirement that the determination of this issue be specified in the indictment.

D. FIELD SOBRIETY TESTS ARE NOT TESTIMONIAL OR COMMUNICATIVE ACTS, AND, THEREFORE, ARE NOT PROTECTED BY THE FIFTH

AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The Sixth District Court of Appeals, in accord with **Pennsylvania v. Muniz**, 496 U.S. 582 (1990), correctly held that physical characteristics, such as the manner in which one speaks, walks or gestures, are non-testimonial in nature and do not invoke one's privilege against self-incrimination. In Ohio, it has been long-settled that field sobriety tests are not testimonial or communicative acts, and, therefore, are not protected by the Fifth Amendment privilege against self-incrimination. **Piqua v. Hinger**, 15 Ohio St.2d 110 (1968). "[T]he nonverbal results of [the] breathalyser and field sobriety tests are not self-incriminating statements." **State v. Henderson**, 51 Ohio St.3d 54, 57 (1990).

Under the rationale of **Muniz**, **Hinger** and **Henderson**, Petitioner's non-cognitive verbal responses to the field sobriety tests, i.e., singing the ABC's and hesitating while counting out loud, were properly admitted. The statements were non-testimonial, non-interrogatory and non-cognitive.

Petitioner has not cited any authority which supports his position. Petitioner merely states that, "Petitioner feels that the state courts here have misinterpreted the

Muniz decision. The Petitioner **feels** that his singing the ABC's does amount to a response to a custodial interrogation..." (Writ at p. 18). (Emphasis added.) Petitioner's **feelings** have nothing whatever to do with the plain holding of this Court in **Muniz** that an individual's physical characteristics, such as the manner in which one speaks, are non-testimonial and do not invoke the Fifth Amendment privilege.

E. SEVERAL COUNTS OF AN INDICTMENT CONTAINING MORE THAN ONE COUNT ARE NOT INTERDEPENDENT AND AN INCONSISTENCY IN A VERDICT DOES NOT ARISE OUT OF INCONSISTENT RESPONSES TO DIFFERENT COUNTS, BUT ONLY ARISES OUT OF INCONSISTENT RESPONSES TO THE SAME COUNT.

The Supreme Court of Ohio has long held that inconsistent verdicts on different counts in a multi-count indictment do not require dismissal of the charges or provide the basis for retrial. **State v. Hicks**, 43 Ohio St.3d 72 (1989); **State v. Brown**, 12 Ohio St.3d 147 (1984); **State v. Adams**, 53 Ohio St.2d 223 (1978), paragraph two of the syllabus, **vac. on other grounds**, 439 U.S. 811. Thus, Ohio has adopted and followed this Court's

holdings in **United States v. Powell**, 469 U.S. 57 (1984) and **Dunn v. United States**, 284 U.S. 390 (1932).

In the case at bar, any alleged discrepancy in the jury's finding of guilt on the two separate counts of vehicular homicide and involuntary manslaughter clearly occurs between counts and not within the same count. Therefore, **Dunn**, **Powell**, **Hicks**, **Brown**, and **Adams** are dispositive of this issue.

F. WHERE STATUTORY PROVISIONS ARE ALLIED OFFENSES OF SIMILAR IMPORT, THE PROSECUTION MAY CHARGE AND TRY BOTH, BUT DEFENDANT MAY BE SENTENCED UPON HIS OR HER CONVICTION FOR ONLY ONE OF THE OFFENSES.

With respect to the offenses of aggravated vehicular homicide and involuntary manslaughter, the Supreme Court of Ohio decreed in **State v. Chippendale**, 52 Ohio St.3d 118, 120 (1990), that "the manifest legislative intent is that the two statutes be enforced coextensively...[W]here the legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses."

Id. at 122.

In the case at bar, the Sixth District Court of Appeals closely examined this issue in light of **Chippendale** and ruled that Petitioner was improperly sentenced on both vehicular homicide and involuntary manslaughter despite the fact that the two sentences were originally ordered to be served concurrently. Upon remand, Petitioner's terms of imprisonment were merged for sentencing purposes and Petitioner was sentenced to only one term of imprisonment of 5 to 10 years.

Petitioner cannot ignore the plain law in Ohio by merely stating that he "feels" there is a constitutional problem at hand. (Writ at p. 22). **Chippendale** is dispositive of the issue of whether aggravated vehicular homicide and involuntary manslaughter may properly be enforced coextensively. Both the Ohio legislature and the Supreme Court of Ohio have responded to that query with a resounding, "Yes." The decisions below were plainly correct applications of well-settled law. Because Petitioner has failed to allege even a conflict among the circuits on this issue, review by this Court is not warranted.

CONCLUSION

For the reasons stated herein, the petition should be denied.

Respectfully submitted,

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UNREPORTED CASES:

State v. Harder, unreported,
Case No. OT-95-031 (Sixth App. Dist.,
Ottawa Co., March 29, 1996) A1-A19

STATE OF OHIO Appellee

v.

Brian HARDER Appellant

Court of Appeals No. OT-95-031

No. 94CR073

Court of Appeals of Ohio, Sixth District, Ottawa County.

Decided March 29, 1996.

Lowell S. Petersen, Prosecuting Attorney, and Mark E. Mulligan, for appellee.

Thomas J. DeBacco, for appellant.

OPINION AND JUDGMENT ENTRY

SHERCK, Judge

****1** This appeal comes to us from a judgment of conviction and imposition of sentence issued by the Ottawa County Court of Common Pleas, after a jury found appellant guilty of vehicular homicide. Because we conclude that the trial court committed no reversible error and the verdict was not against the manifest weight of the evidence, we affirm the judgment of the trial court.

On July 24, 1993, at approximately 11:30 p.m., a collision occurred between a full size pickup truck and a tractor-trailer rig. The pickup contained two people: twenty-one yea old Brian R. Harder (the appellant in this case) and a twenty year old woman, Kimberly Kyser. The driver of the semi was not seriously injured and appellant received only minor injuries. However, Kimberly was killed when she was thrown from the vehicle and smashed her head against the side of the semi's trailer. The accident occurred as a result of the failure of the driver of the pickup to stop at a stop sign at Russell Road, where Russell Road intersects with Route 2 just west of Port Clinton, Ohio.

Appellant, who was alleged to be the driver of the pickup, was indicted for aggravated vehicular homicide in violation of R.C. 2903.06. The indictment contained a specification that appellant was under the influence of alcohol at the time of the incident. Prior to trial, appellant waived his right to a jury as to the alcohol specification and was granted a request that such determination be made by the trial court.

At trial, various witnesses testified

as to the events of the day leading up to the accident. A summary of this testimony reveals that appellant and Tracy Seymour, a friend and owner of the pickup, had gone out fishing. The two had purchased two twelve packs of beer. Seymour testified that, over the course of the morning, he had consumed four and appellant drank at least one of the beers. However, Seymour then testified that a total of eight beers had been consumed and no one else had been drinking with the two men. Appellant and Seymour then drove around in an effort to locate Seymour's girlfriend, Renee St. Clair, who was also a friend of Kimberly's. The two eventually decided to look at the Kyser residence where Kimberly lived with her parents. Seeing Renee's car outside the Kyser home, Seymour parked the truck and Renee and Kimberly came out of the house to talk to them.

Seymour got out of his truck and began talking with Renee in her car. Kimberly chatted with appellant who took a beer from a cooler in the back of Seymour's truck and began to drink it. Because Seymour and Renee wanted to go for a drive to talk, Kimberly agreed to go for a drive with appellant. Kimberly then left with appellant who was driving Seymour's truck; Seymour and Renee left in Renee's car. After about an hour,

the couples returned to Kimberly's house. However, they left again, with appellant still driving the pickup. They all agreed to meet later at Wild Wings, a local restaurant, located at the northeast corner of the intersection where the accident occurred.

**2 Seymour and Renee testified that, at the time of the accident, they were waiting in the Wild Wings parking lot for appellant and Kimberly. Upon hearing the crash, Seymour went to the scene, along with a number of other people. Seymour talked with appellant and then went to telephone appellant's parents about the accident.

The driver of the semi rig testified that he was traveling west on Route 2 at approximately fifty-two m.p.h. when the pickup, traveling from the south side of the intersection at Russell Road struck him. The driver stated that the impact caused his semi to begin to jack-knife and then to leave the right side of the road where it ultimately came to rest.

Three Ottawa County Sheriff's Deputies testified as to their observations at the scene of the accident and information contained in their reports. Deputy Douglas St. Clair testified that he was the first

police officer to arrive at the scene. St. Clair testified that he first examined Kimberly who was pinned underneath the rear of the pickup. After determining that she was deceased, the deputy turned to appellant who was lying on the ground near the right rear tire of the pickup. St. Clair stated that, in response to questions, appellant said that his name was "Brian Harder," that he was the driver of the pickup truck, and that his birthday was September 17, 1971 (his correct date of birth). However, appellant told St. Clair that he did not know how the accident happened. According to St. Clair, appellant appeared to be seriously injured and in pain. He was later life flighted to St. Vincent's Medical Center. Appellant's injuries proved, however, to be minor.

While he was checking appellant for injuries, St. Clair stated that he did not detect any odor of alcohol from appellant. However, based upon the emergency medical squad's observation that appellant smelled of alcohol, St. Clair ordered that appellant be investigated for bing under the influence of alcohol.

St. Clair further testified as to the debris on the roadway, which included two

coolers, a full bag of ice, approximately two twelve packs of beer and scattered empty beer cans. St. Clair also testified that he examined the area around the stop sign which was posted on Russell Road, south of the intersection. The deputy found that the stop sign was reflective and clearly visible. The officer noted that, although farther south from the intersection a row of trees grew along the side of the roadway, the east view of Route 2 was unobstructed leading up to that stop sign.

The other two officers, Deputy James Karr and Deputy Sergeant William Windnagel, testified as to measurements made, photographs taken, diagrams of the pathways taken by the vehicles, observations of the scene at the time of the accident, damage to the vehicles, and the transport of appellant's blood specimen drawn at the hospital approximately two hours after the accident. Windnagel further testified that, when he observed appellant in the ambulance, appellant smelled of alcohol and appeared to be in shock or intoxicated.

**3 Dr. Robert B. Forney, associate professor of pathology and doctor of toxicology in the Poison Control Center of the Medical College of Ohio ("MCO"),

testified as to the results of the blood tests performed under his supervision at the MCO laboratory. The results of the analysis of appellant's blood showed .15 grams per one hundred milliliters ethanol. Forney stated that appellant's urine was tested only for drugs; it showed negative for five common drugs of abuse. The doctor then testified as to how much alcohol would remain in the blood stream two hours after drinking various amounts of alcohol.

Forney also testified that another analysis performed by the hospital on blood drawn from appellant at approximately the same time yielded a result of .27 grams per one hundred milliliters ethanol. The doctor explained that various human errors in testing the blood could account for the difference in results, including the drawing of blood through a device known as a Heparin lock used during the attachment of an intravenous needle. Although conceding the possibility that both blood tests might be incorrect, Forney testified that, in his opinion, the first test result of .15 performed under his supervision at MCO, was accurate. Appellant stipulated that the Medical College's "analytical methods were appropriate in gathering the blood and their method of doing the test."

The county coroner testified that the cause of death was multiple blunt trauma caused by the accident, indicating various head injuries.

Several other witnesses testified as to appellant's appearance and orientation after the accident. Elizabeth Hueske, a volunteer with the Emergency Medical Squad, testified that appellant "sounded alert" in the ambulance. Christine Skiver, a customer at the gas station who ran over immediately after the accident and spoke with appellant, testified that she noticed a "really, really, strong smell of alcohol on his breath." She also testified that appellant attempted to get up and appeared to be in pain; however, he appeared to understand what she was saying, nodding yes in response to her question of whether he could breath.

Paul Junge, a cook at Wild Wings, testified that he ran to the scene, ran back to call 911, and then returned to the accident with some wet towels to wipe blood from appellant's face. Junge testified that he spoke with appellant for five or six minutes and during that time smelled a strong odor of alcohol. Junge further sated that, based upon his experience of working around restaurants and bars for thirty-three years,

appellant was "definitely drunk, no doubt about it."

Laurie Pollard, a waitress at Wild Wings, testified that, although moaning in pain, appellant told her his name and that his dad's name was Bob Harder from Port Clinton. Appellant also responded at first that nobody was with him in the truck, but then said that "it could be or might be Kimberly Kyser." Pollard also stated that she did not smell alcohol on appellant. She stated, however, that she had not gotten very close to him because she wanted to avoid a pool of blood on the pavement.

**4 At the close of the state's case, appellant moved for acquittal; this motion was denied by the trial court. Appellant presented no additional defense. The jury was instructed on the aggravated vehicular homicide charge. In addition and over the state's objection, appellant was granted a request for a jury instruction as to the lesser included offense of vehicular homicide. The trial court also included an instruction that the evidence as to appellant's alcohol consumption was to be used by the jury only as it affected their consideration of whether appellant acted recklessly or negligently. The court further

instructed that the court and not the jury would determine whether appellant was legally under the influence of alcohol.

The jury found appellant not guilty of aggravated vehicular homicide, but guilty as to vehicular homicide. The trial court by separate judgment entry then determined that the evidence demonstrated beyond a reasonable doubt that appellant was under the influence of alcohol at the time of the accident.

After reviewing a presentence report, the trial court sentenced appellant to a term of six months imprisonment, a fine of $1,000, and permanently revoked appellant's driver's license.

Appellant now appeals his conviction and sentence, setting forth the following two assignments of error:

"ASSIGNMENT OF ERROR ONE

"PREJUDICIAL ERROR OCCURS WHEN THE TRIAL JUDGE, ON ITS OWN INITIATIVE, INSTRUCTS THE JURORS TO TAKE NOTES.

"ASSIGNMENT OF ERROR TWO

"(a) THE DOUBLE JEOPARDY CLAUSE OF the

CONSTITUTION PROHIBITS A TRIAL COURT FROM RULING [SIC] THE ACCUSED WAS 'UNDER THE INFLUENCE OF ALCOHOL' WHEN THE JURY HAS ALREADY BASED PART OF ITS VERDICT ON THE FACTUAL QUESTION OF ALCOHOL CONSUMPTION.

"(b) THE FINDING BY THE JUDGE THAT THE ACCUSED WAS UNDER THE INFLUENCE OF ALCOHOL IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"(c) THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

Appellant, in his first assignment of error, argues that the trial court committed prejudicial error when, on its own initiative, it instructed the jurors to take notes.

A trial court has the discretion to permit jurors to take notes. *State v. Wilson* (1996), 74 Ohio St.3d 381, 389; *State v. Loza* (1994), 71 Ohio St.3d 61, 74. The trial court does not abuse its discretion when it adequately instructs the jury that note taking may be used to assist the jury but should not distract the jurors from the primary duty of hearing the evidence and testimony as it is presented by the

witnesses. *Wilson, supra.* In addition, where no objection is made concerning note taking, a defendant waives all but plain error. *Id.* (FN1)

In this case, no objection was made to the trial court's initiating note taking by the jurors. However, even had such an objection been made, we cannot say that the trial court committed any error prejudicial to the outcome of appellant's trial.

The trial court told the jury that note taking was not required, that it was a matter of individual choice, and that the jury's main concern was to listen to the witnesses. Therefore, in accord with *Wilson, supra* and *Loza, supra,* appellant had failed to demonstrate that any prejudice occurred or that the trial court abused its discretion by permitting the jurors to take notes.

**5 Accordingly, appellant's first assignment of error is not well-taken.

II.

Appellant's second assignment of error consists of three unrelated sub-parts. In sub-part (a), appellant argues that the trial court's affirmative determination of the

alcohol specification constituted double jeopardy.

Appellant was convicted of vehicular homicide. R.C. 2903.07 provides that:

"(A) No person, while operating or participating in the operation of a motor vehicle *** shall negligently cause the death of another."

"(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree.***

"***

"If the jury or judge as trier of fact finds that the offender was under the influence of alcohol *** at the time of the commission of the offense, then the offender's driver's or commercial driver's license or permit or nonresident operating privileges shall be permanently revoked pursuant to section 4507.16 of the Revised Code."

Once an individual has been found guilty of vehicular homicide, the statute provides for the additional step of determining whether a defendant committed the offense while under the influence of alcohol

or drugs. Thus, a jury may find a defendant guilty of vehicular homicide without finding that the defendant was under the influence of alcohol.

In the present case, appellant contends that his acquittal of the aggravated vehicular homicide charge coupled with his being found guilty of vehicular homicide precludes a later finding by the trial court that appellant was under the influence of alcohol. Appellant's argument is, however, flawed because it presumes that if the jury believed appellant to be under the influence of alcohol, it could only have found appellant guilty of aggravated vehicular homicide. In this case, evidence of appellant's alcohol consumption was presented to the jury for negligence purposes only, and that evidence was such that a jury could conclude that appellant's actions constituted a substantial lapse of due care.

Moreover, appellant's argument ignores the fact that, by his own request, the two steps of R.C. 2903.07 were performed by two different triers of fact. The jury determined appellant's guilt as to the vehicular homicide charge and then the trial court determined whether or not appellant was legally under the influence of alcohol. The

jury made no finding as to whether or not appellant was legally under the influence of alcohol. Therefore, the trial court's finding as to the alcohol specification did not place appellant in double jeopardy but simply fulfilled the appropriate steps provided in R.C. 2903.07.

Accordingly, sub-part (a) of appellant's second assignment of error is not well-taken.

III.

Appellant's remaining two sub-parts of his second assignment of error pertain to manifest weight issues. In sub-part (b), appellant argues that the finding by the judge that appellant was under the influence of alcohol was against the manifest weight of the evidence. In sub-part (c), appellant contends that the jury verdict was against the manifest weight of the evidence.

**6 Upon review of the sufficiency of the evidence to support a criminal conviction, an appellate court must examine

"the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's

guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

"Relevant inquiry" does not include interpretation of evidence or determination of credibility of witnesses by the appellate court. *Id.* at 273. The verdict will not be overturned unless reasonable minds could not reach the conclusion reached by the trier of fact. *Id.*

We have previously noted the elements of vehicular homicide. R.C. 2903.07, *supra*. R.C. 2903.07 also provides, in pertinent part:

"When the trier of fact determines whether the offender was under the influence of alcohol ***, the concentration of alcohol in the offender's blood, breath, or urine as shown by a chemical test *** may be considered as competent evidence and the offender shall be presumed to have been under the influence of alcohol if there was at the time the bodily substance was withdrawn for

the chemical test a concentration of ten-hundredths of one per cent or more by weight of alcohol in the offender's blood***."

In addition to chemical tests, the trier of fact may consider other admissible evidence, such as other "physical signs" which may indicate that a defendant is under the influence. See *State v. Myers* (1971), 26 Ohio St.2d 190,199.

In the present case, it is undisputed that the pickup truck failed to yield the right of way to another vehicle, resulting in the death of Kimberly Kyser. The evidence showed that appellant was the operation of the pickup at the time of the accident. In addition to the results of the blood alcohol tests, several witnesses testified that appellant smelled of alcohol and appeared to be intoxicated. Although the evidence may have been conflicting in some respects, it is for the trier of fact to sort out such evidence in making its factual determinations.

Therefore, since we conclude that competent evidence was presented from which any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, neither the jury's

verdict finding appellant guilty of vehicular homicide (FN2) nor the trial court's finding that appellant was under the influence of alcohol at the time of the collision were against the manifest weight of the evidence.

Accordingly, appellant's second assignment of error, in its entirety, is not well-taken.

The decision of the Ottawa County Court of Common Pleas is affirmed. Court costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED.

**7 A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also 6th Dist.Loc.App.R. 4, amended 7/1/92.

GLASSER and SHERCK, JJ., and RESNICK, P.J., concur.

FN1. Appellant has referred us to the cases of *Corbin v. Cleveland* (1944), 144 Ohio St. 32 and *State v. Waddell* (Sept. 29, 1994), Franklin App. 94APA03-328, unreported, in support of his first assignment of error. However, our research indicates that these cases no longer represent the law as now

articulated by the Supreme Court of Ohio.

FN2. As counsel for appellant so aptly stated when arguing for the inclusion of the jury instruction as to a lesser included charge, "There is ample evidence to support a finding of guilty on vehicular homicide."